STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellant/Cross-Appellee,	UNPUBLISHED November 4, 2003
v	No. 237715 Kent Circuit Court
ROBERT DWAYNE BLAKLEY III, Defendant-Appellee/Cross-Appellant.	LC No. 01-004626-FH

Before: Cooper, P.J., and Fitzgerald and Kelly, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of attempted possession of more than 225 but less than 650 grams of cocaine, MCL 750.92; MCL 333.7403(2)(a)(ii), and was sentenced to imprisonment for eleven months. The prosecutor appeals defendant's sentence as of right, and defendant cross-appeals. We affirm.

The prosecutor originally charged defendant with conspiracy to possess with intent to deliver over 650 grams of cocaine and conspiracy to possess more than 650 grams of cocaine. In an amended information dated May 17, 2001, the prosecutor added a third count charging defendant with attempting to possess over 650 grams of cocaine. The third count alleged that defendant:

> did attempt to commit an offense prohibited by law, to wit: POSSESS OVER 650 GRAMS OF COCAINE, and in said attempt did act towards the commission of said offense, but failed in the perpetration or was prevented in the execution thereof; contrary to MCL 750.92; MSA 28.787. LIFE [333.74032A1[A]].

Count three cited the general attempt statute, MCL 750.92, which provides in relevant part:

> Attempt to commit crime – Any person who shall attempt to commit an offense prohibited by law, and in such attempt shall do any act towards the commission of such offense, but shall fail in the perpetration, or shall be intercepted or prevented in the execution of the same, when no express provision is made by law for the punishment of such attempt, shall be punished as follows:

* * *

> 2. If the offense so attempted to be committed is punishable by imprisonment in the state prison for life, or for 5 years or more, the person convicted of such attempt shall be guilty of a felony, punishable by imprisonment in the state prison not more than 5 years or in the county jail not more than 1 year . . . .

Defendant was sentenced on August 28, 2001, to eleven months' incarceration. In fashioning the sentence, the trial court noted that "the Information clearly charges [defendant] under section 92 of the Penal Code which sets the five year maximum."[1] The prosecutor did not object to the sentence.

The prosecutor moved for resentencing on September 10, 2001. He asserted that the plain language of the general attempt statute provides that the statute only applies "when no express provision is made by law for the punishment of such attempt." Because an express provision for the punishment of an attempted violation of the controlled substances provision of the public health code is provided in MCL 333.7407a, the prosecutor argued that defendant must be punished as if he completed the crime. Thus, the prosecutor maintained that defendant was subject to a minimum twenty-year term of imprisonment pursuant to MCL 333.7403(2)(a)(ii), and that the sentence imposed by the trial court was therefore invalid. The trial court denied the motion for resentencing, concluding that because "defendant was charged under Section 750.92 . . . he needs to be sentenced accordingly and pursuant to the statutory language there."

Where two statutes prohibit the same conduct, the defendant must be charged under the more specific, recently enacted statute. *People v Patterson*, 212 Mich App 393, 394-395; 538 NW2d 29 (1995). Here, the prosecutor charged defendant under the general attempt statute, which was enacted in 1927. The Legislature amended the Public Health Code in 1994 PA 220 by including a specific statute criminalizing attempts to violate the controlled substance part of the Public Health Code. MCL 333.7407a. See *People v Burton*, 252 Mich App 130, 134, n 4; 651 NW2d 143 (2002). Because MCL 333.7407a was more recently enacted and is more specific, defendant should have been charged under § 7407a(1). However, the prosecutor cannot be heard to complain of an error that was his fault. See *Harville v State Plumbing & Heating, Inc.*, 218 Mich App 302, 323-324; 553 NW2d 377 (1996). Because defendant was charged under the general attempt statute, we cannot conclude that the trial court abused its discretion by sentencing defendant in accordance with that statute.

Nonetheless, even if we agreed with the prosecutor that defendant should have been sentenced pursuant to § 7407a(1), resentencing would not be warranted. Resentencing is only appropriate when a reviewing court concludes that the sentence imposed is invalid. *People v Mutchie*, 251 Mich App 273, 274; 650 NW2d 733 (2002). A sentence is invalid if there is "some 'legal flaw' in a sentence . . . or a 'tangible legal or procedural error' leading to a sentence." *Id,*

[1] The trial court also noted that, "I think everyone believed that the possession statute made the crime punishable the same way regardless of whether the possession was a completed offense or an attempted offense, and I think the fact of the matter is that the statute does not allow that interpretation."

quoting *People v Thenghkam*, 240 Mich App 29, 70-71; 610 NW2d 571 (citations omitted). Here, defendant's sentence is not invalid despite the fact that the prosecutor charged defendant under the wrong attempt statute. The language of the statute governing attempts to commit a controlled substances violation gives the trial court discretion to sentence a defendant who attempts to commit a controlled substances violation to the same sentence as if he completed the crime *or* to a lesser sentence, and it is clear from the trial court's comments that the trial court recognized this discretion. See n 1, *supra*.

MCL 333.7407a provides that "a person who violates this section is guilty of a crime *punishable* by the penalty for the crime he or she attempted to commit . . . ." (emphasis added). In enacting § 7407a the Legislature did not specifically provide that a person convicted of an attempted controlled substances violation "shall be punished" as if the person committed the crime. The word "shall" is generally used to designate a mandatory provision. *Roberts v Mecosta Co Gen'l Hosp*, 466 Mich 57, 65; 642 NW2d 663 (2002). By choosing not to use the mandatory language, the Legislature made a distinction between the discretionary term "punishable" and the mandatory phrase "shall be punished."

In contrast, the Legislature used the mandatory "shall be punished" in the conspiracy statute. MCL 750.157a. In subsection (a), the conspiracy statute states that if commission of the offense "is punishable by imprisonment for 1 year or more, the person convicted under this section shall be punished by a penalty equal to that which could be imposed if he had been convicted of committing the crime he conspired to commit." The same mandatory language was used in subsections (b), (c), and (d) of the conspiracy statute.

A review of the various penalty provisions in the Michigan Penal Code reveals that the Legislature used the term "punishable" as a limit rather than as a requirement. For example, the felonious assault statute, MCL 750.82, states that a person who violates the statute "is guilty of a felony punishable by imprisonment for not more than 4 years . . ." Thus, one who is guilty of felonious assault may be sentenced to a term of four years or a term less than that. Similarly, the kidnapping statute, MCL 750.349, states that one who commits acts that satisfy the definition of kidnapping "shall be guilt of a felony, punishable by imprisonment in the state prison for life or any term of years." That language clearly permits a sentencing court to impose a life sentence, but does not require the sentencing court to do so. In contrast, the first-degree murder statute, MCL 750.316, states that a person who commits acts satisfying the definition of first-degree murder "shall be punished" by imprisonment for life. In that situation, a court may not sentence the defendant to anything but imprisonment for life.

The Legislature is presumed to be aware of the consequences of its use or omission of statutory language. *In re Messer Trust*, 457 Mich 371, 380; 579 NW2d 73 (1998). When enacting § 7407a the Legislature could have used the phrase "shall be punished" as it did in the conspiracy statute, but instead elected to use the discretionary term "punishable." Because the Legislature used the discretionary term "punishable" in § 7407a rather than the mandatory "shall be punished" language, the trial court had discretion and was not required to impose the

mandatory minimum term applicable to a completed crime. The sentence, therefore, is not an invalid sentence under § 7407a.[2]

On cross-appeal,[3] defendant argues that the evidence was insufficient to sustain the conviction of attempted possession of between 225 and 650 grams of cocaine because the testimony of the prosecution witnesses was not credible. However, questions regarding the credibility of witnesses are to be resolved by the trial of fact, and this Court should not interfere with the jury's role of determining the credibility of witnesses. *People v Nowack*, 462 Mich 392, 400; 614 NW2d 78 (2000). Viewed in a light most favorable to the prosecution, the evidence was sufficient to permit a rational trier of fact to conclude that the essential elements of the crime were proven beyond a reasonable doubt. *Nowack*, *supra* at 399-4000.

Defendant also argues that the circuit court abused its discretion by failing to quash the district court's decision to bind defendant over for trial on the charge of attempted possession of between 225 and 650 grams of cocaine. Even if the district court abused its discretion in binding defendant over for trial, any error in this regard would be harmless. "The erroneous conclusion that sufficient evidence was presented at the preliminary examination is rendered harmless by the presentation at trial of sufficient evidence to convict." *People v Libbett*, 251 Mich App 353, 357; 650 NW2d 407 (2002).

Affirmed.

/s/ Jessica R. Cooper
/s/ E. Thomas Fitzgerald
/s/ Kirsten Frank Kelly

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[2] Even though the trial court sentenced defendant under the general attempt statute, remand for resentencing on this basis would clearly be a waste of judicial resources. The trial court had discretion to sentence defendant to a prison term of up to five years under the general attempt statute, but sentenced defendant to a term of only eleven months' imprisonment. It is clear that the trial court was aware of its sentencing discretion and determined that a lengthy sentence was not warranted. It is also clear that the trial court realized, consistent with our holding in this case, that a conviction for attempted possession under § 7407a(1) does not mandate that defendant be sentenced as though he completed the offense.

[3] Defendant's arguments in his cross-appeal have not been preserved for appeal because they were not set forth in a statement of the questions involved. MCR 7.212(C)(5); *People v Yarbrough*, 183 Mich App 163, 165, 454 NW2d 419 (1990). However, we will briefly address the arguments.